United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FILED
JUL 5 1977
JA. DANIEL FUSARO, CLERK
SECOND CIRCUIT

77-7130

United States Court of Appeals

FOR THE SECOND CIRCUIT

BPLS

FLLI MORETTI CEREALI S.p.A.,

Plaintiff-Appellee,

—against—

CONTINENTAL GRAIN COMPANY,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

BURLINGHAM UNDERWOOD & LORD
Attorneys for Plaintiff-Appellee
One Battery Park Plaza
New York, New York 10004
Hanover 2-7585

MICHAEL MARKS COHEN
ROBERT J. ZAPF
Of Counsel

TABLE OF CONTENTS

PAGE

Counterstatement of the Issues on Appeal 1

Counter-Summary of the Case 2

Counterstatement of the Facts 3

A. The Wheat Contracts 3

B. The Corn Contract 3

C. The Soybean Contract 4

D. Suit in the Southern District of New York 4

E. Arbitration in London 5

F. Suit in Rome 5

G. Arbitration in New York 6

H. Motion for Summary Judgment 6

POINTS:

I. Plaintiff Was Entitled to Summary Judgment Under the Two Wheat Contracts 7

II. The Court Below Properly Dismissed the Counterclaim 9

A. The Assignment Was Ineffective 11

B. The Assignment Was Invalid 13

C. There Was No Triable Issue Concerning a Running Account 16

D. Defendant Is Not Otherwise Entitled to Set Off Export's Soybean Claim 18

CONCLUSION 21

Table of Authorities

PAGE

Cases:

American Optical Co. v. *Curtiss,* 56 F.R.D. 26 (S.D. N.Y. 1971) 14

American Restaurant China Mfrs. Ass'n v. *Corning Glass Works,* 24 M.2d 634, 198 N.Y.S.2d 366 (Sup. Ct. 1960) 14

Bennett v. *Supreme Enforcement Corp.,* 275 N.Y. 502 (1937), aff'g 250 A.D. 265, 293 N.Y. Supp. 870 (1st Dep't 1937) 14

Bono v. *United States,* 113 F.2d 724 (2 Cir. 1940) 18

Cannon Mfg. Co. v. *Cudahy Packing Co.,* 267 U.S. 333 (1925) 19

Cold Metal Process Co. v. *United Eng'r & Foundry Co.,* 351 U.S. 445 (1956) 10

Community of Roquefort v. *William Faehndrich,* 303 F.2d 494 (2 Cir. 1962) 15, 17

Compania Mexicana v. *Compania Metropolitana,* 250 N.Y. 203, 164 N.E. 907 (1928) 19

Cook v. *Bostitch,* 328 F.2d 1 (2 Cir. 1964) 19

Donnelly v. *Guion,* 467 F.2d 290 (2 Cir. 1972) 14-15

Ehrlich v. *American Moninger Greenhouse Mfg. Corp.,* 26 N.Y.2d 255, 309 N.Y.S.2d 341 (1970) 14, 16

Empresa Publica de Commercializacion v. *S.S. Yukon Mart,* 2 Cir. Dkt. No. 76-7505 20

Fowler v. *Coals,* 418 F. Supp. 909 (E.D. Tenn. 1976) .. 12

PAGE

Green & White Const. Co. v. *Cormat Const. Co.*, 361 F. Supp. 125 (N.D. Ill. 1973) 11

Instruments For Industry v. *United States*, 496 F.2d 1157 (2 Cir. 1974) 13

I/S Stavborg v. *National Metal Converters*, 500 F.2d 424 (2 Cir. 1974) 5

Jones v. *United States*, 304 F. Supp. 94 (S.D.N.Y. 1969), aff'd, 421 F.2d 835 (2 Cir. 1970) 13

Kramer v. *Caribbean Mills*, 394 U.S. 823 (1969) 14

Miller v. *Wells Fargo Bank Int'l. Corp.*, 540 F.2d 548 (2 Cir. 1976) 12

National Shawmut Bank v. *The Winthrop*, 134 F. Supp. 370 (D. Mass. 1955) 17

Parker v. *Wellborn*, 261 F.2d 767 (D.C. Cir. 1958) ..8, 10

Pease & Elliman v. *926 Park Avenue Corp.*, 23 A.D.2d 361, 260 N.Y.S.2d 693 (1st Dep't), aff'd 17 N.Y.2d 890, 271 N.Y.S.2d 992 (1966) 8-9

Prudential Oil Corp. v. *Phillips Petroleum Co.*, 546 F.2d 469 (2 Cir. 1976) 14

Pumice Aggregates v. *Lep Chartering*, [1976] 1 Ll. L. Rep. 529 (C.A. 1975) 9, 19, 20

Schley v. *Pullman Car Co.*, 120 U.S. 575 (1887)..... 18

Schroeter v. *Ralph Wilson Plastics*, 49 F.R.D. 323 (S.D. N.Y. 1969) 8, 9

Tierney v. *Dowd*, 238 N.Y. 282, 144 N.E. 583 (1924) 17

PAGE

United Continental Tuna Corp. v. *United States*, 550 F.2d 569 (9 Cir. 1977) 19-20

United States v. *Anderson*, 481 F.2d 685 (4 Cir.), aff'd, 417 U.S. 211 (1974) 18

United States v. *Seckinger*, 397 U.S. 203 (1970) 13

Weitnauer Trad. Co. v. *Annis*, 516 F.2d 878 (2 Cir. 1975) 8, 19, 20

Statutes and Rules:

Federal Rules of Civil Procedure,
Rule 8(d) 8, 19
Rule 9(g) 15
Rule 54(b) 8, 9
Rule 56 3
Rule 56(e) 14
Rule 62(h) 8, 9

Int. Rev. Code of 1954, §§991-97 16

28 U.S.C. §1359 14

N.Y. Gen. Obl. L. §13-101(3) 14

N.Y. Judiciary Law §489 13-14

English Arbitration Act, 14 Geo. 6. c. 27, §21(1) 5

General:

6 Moore's Federal Practice ¶56.17(15) (2d Ed. Moore & Wicker 1976) 8

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-7130

FLLI MORETTI CEREALI S.p.A.,

Plaintiff-Appellee,

—against—

CONTINENTAL GRAIN COMPANY,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

Counterstatement of the Issues on Appeal

1. Was plaintiff entitled to summary judgment on the two wheat contracts?

The court below properly answered "yes" (A117-18).

2. Was the assignment of an unrelated counterclaim, in favor of one of defendant's associated companies and arising under a soybean contract, ineffective or invalid?

The court below properly answered "yes" (A119-21).

3. Was there a triable issue of fact concerning a running account between plaintiff and defendant?

The court below did not reach this question but strongly indicated that, had it done so, the answer would be "no" (A123).

4. Was defendant otherwise entitled to set off a counterclaim belonging to one of its associated companies?

This question was not raised below and the answer should be "no".

Counter-Summary of the Case

Plaintiff sued defendant for recovery of an undisputed sum owed by defendant in connection with two contracts between plaintiff and defendant for the sale of wheat. Defendant counterclaimed for alleged breach of an unrelated contract between plaintiff and one of defendant's associated companies for the sale of soybeans.

Plaintiff moved for partial summary judgment on the wheat contracts. Defendant conceded that the money was owed but asked the court to withhold entry of judgment, or to stay execution of it, pending the outcome of arbitration in London between plaintiff and defendant's associated company under the soybean contract.

The court dismissed the soybean counterclaim without prejudice and directed entry of final judgment in plaintiff's favor on the wheat claims. This decision completely disposed of the case, leaving all controversies between plaintiff and three of defendant's associated companies for resolution in other forums where they are now pending.

Counterstatement of the Facts

A.

The Wheat Contracts

In 1974, plaintiff contracted to sell defendant a certain quantity of wheat (A22-23). Subsequently, in January 1976, this sale was washed out leaving a net balance of $223,520 owed by defendant to plaintiff, which has never been paid (A24-26, 28).

In 1974, plaintiff separately contracted to sell to defendant an additional quantity of wheat (A29-30). This contract was also washed out in a "circle settlement", leaving a net balance of $225,866.96 owed by defendant to plaintiff, which has never been paid (A31).

B.

The Corn Contract

In 1975, plaintiff contracted to sell to Deutsche Conti-Handelsgesselschaft (hereinafter referred to as "Deutsche"), one of defendant's associated companies, a certain quantity of corn (A32-34). In January 1976, this sale was washed out leaving a net balance of $390,000 owed by Deutsche to plaintiff which has never been paid (A35-36).

C.

The Soybean Contract

In 1974, plaintiff contracted to buy from Continental Grain Export Corporation (hereinafter referred to as "Export"), another of defendant's associated companies, a certain quantity of soybean meal in monthly shipments from November 1975 through August 1976 (A37-39). The November shipment was cancelled by mutual agreement between the parties. On January 30, 1976, plaintiff took delivery and paid for the December and January shipments (A76-79). Thereafter, plaintiff and Export became embroiled in a dispute which Export treated as a repudiation by plaintiff of the balance of the soybean contract (A61-62).

On March 2, 1976, defendant purportedly took an "assignment" of Export's claim against plaintiff under the soybean contract (A115-16).

D.

Suit in the Southern District of New York

In the meantime on February 18, 1976, plaintiff sued defendant herein to recover the net balances due under the wheat contracts (A4-7).

Plaintiff also alleged in a separate cause of action that the corn contract had been made with defendant "through" Deutsche (A7). In its answer, defendant denied that "it was a party to the agreement" constituting the corn contract (A8). Eventually the parties stipulated to dismiss this cause of action without prejudice (A124).

In the answer, defendant also alleged the assignment to it of Export's claim against plaintiff for alleged breach of the soybean contract and counterclaimed on the assignment (A9-10).

E.

Arbitration in London

On March 17, 1976 Export in its own name demanded arbitration under the soybean contract before the Grain and Feed Trade Association (hereinafter referred to as "GAFTA") in London (A63). On September 21, 1976, Export was granted a preliminary arbitration award for the full amount of its claim under the soybean contract (A80). Pursuant to the GAFTA rules (A81-84), plaintiff appealed the preliminary award to a Board of Appeal (A77). There is presently pending before the High Court of Justice a motion to compel the Board of Appeal to state a "special case," which would subject the legal grounds of the award to judicial review.[1]

F.

Suit in Rome, Italy

On March 24, 1976, plaintiff brought suit in Rome, Italy against another of defendant's associated companies, Compagnia Continentale Italiana (hereinafter referred to as

---

[1] Section 21(1) of the English Arbitration Act (14 Geo. 6, c. 27) provides in pertinent part that, if so directed by the High Court, arbitrators shall state "any question of law arising in the course of the reference; or * * * an award or any part of an award in the form of a special case for the decision of the High Court." This sort of proceeding is unknown here where arbitration awards are not subject to review for errors of law. *I/S Stavborg* v. *National Metal Converters,* 500 F.2d 424, 427-32 (2 Cir. 1974).

"Italiana") for commercial defamation and penal disparagement of plaintiff in connection with the wheat, corn and soybean contracts, which severely damaged plaintiff's credit arrangements with various banks (A85-101). Preliminary proceedings in this suit are going forward.

G.

Arbitration in New York

On February 11, 1977, after plaintiff and defendant had stipulated for dismissal without prejudice of plaintiff's cause of action under the corn contract (A124), plaintiff commenced arbitration against Deutsche under the corn contract before the American Arbitration Association in New York. On June 21, 1977 a hearing was held and the arbitrators took the case under advisement.

H.

Motion for Summary Judgment

On July 23, 1976, plaintiff moved for partial summary judgment on its claims under the two wheat contracts (A14-52). Defendant opposed the motion alleging for the first time that there was a "running account" between plaintiff and defendant (A55, 57), as well as realleging (but not producing) the assignment of the soybean contract by Export to defendant (A56).

On January 7, 1977, the Hon. Robert J. Ward called an informal conference in chambers indicating that he was inclined to grant plaintiff's motion for partial summary judgment, but that because of the large sum involved, he wanted to afford defendant an opportunity to offer oral argument.

At the conference, defendant finally produced copies of the assignment (A115-16) and argued against the motion.

On January 31, 1977, Judge Ward granted plaintiff's motion for partial summary judment on the two wheat claims and sua sponte dismissed defendant's soybean counterclaim, without prejudice to the London arbitration proceedings (A117-23, 125). This appeal followed.

The determinations below had the effect of completely disposing of the case, leaving open for future resolution

(i) The claim by plaintiff against Deutsche under the corn contract, now in arbitration in New York;

(ii) The claim by Export against plaintiff under the soybean contract, now in arbitration in London; and

(iii) The claim by plaintiff against Italiana, now in litigation in Rome.

ARGUMENT

I.

Plaintiff was entitled to summary judgment under the two wheat contracts.

Defendant has never disputed it owes plaintiff $449,386.96, representing the balances arising from the washouts of the two wheat contracts.

Before suit, defendant acknowledged the debts in writing (A28, 31). In the complaint, plaintiff alleged that the contracts had been washed out leaving the aggregate sum as a balance "in plaintiff's favor" which defendant "has not paid" (A5-6). Defendant did not answer those allega-

tions (A8). Under F.R.C.P. 8(d), such unanswered allegations are deemed to be "admitted". *Weitnauer Trading Co.* v. *Annis,* 516 F.2d 878, 880-81 (2 Cir. 1975).

The absence of any dispute is also indicated by the fact that defendant never demanded arbitration of these claims (A57) under Form No. 2 of the North American Export Grain Association (hereinafter referred to as "NAEGA") which was incorporated by reference into the wheat contracts (A23, 27-27a, 30).[2]

Indeed, defendant's Assistant Vice President, P. Eugene Bryant, agreed in his affidavit that the $449,386.96 was a sum which "defendant admits to be owing the plaintiff" under the two wheat contracts (A55).

Thus, considering just plaintiff's undisputed, liquidated claims under the wheat contracts, there was no "genuine issue as to any material fact" and plaintiff was clearly "entitled to a judgment as a matter of law" within the meaning of F.R.C.P. 56. The existence of a contested counterclaim under the soybean contract may raise questions of whether the court below should have entered "final" judgment under F.R.C.P. 54(b) or stayed enforcement of the final judgment under F.R.C.P. 62(h), but simply the counterclaim itself was not a barrier to entry of summary judgment on plaintiff's undisputed claims under the wheat contracts. *Parker* v. *Wellborn,* 261 F.2d 767 (D.C. Cir. 1958); *Schroeter* v. *Ralph Wilson Plastics,* 49 F.R.D. 323 (S.D.N.Y. 1969); 6 *Moore's Federal Practice,* ¶56.17(15) (2d ed. Moore & Wicker 1976); cf. *Pease & Elliman* v.

[2] The reverse of the NAEGA 2 Form which appears on page A27 of the Appendix was inadvertently omitted and, with leave of the court, plaintiff will hand up the missing page, marked A27a, at the oral argument.

926 Park Ave. Corp., 23 A.D.2d 361, 260 N.Y.S.2d 693 (1st Dep't), aff'd mem., 17 N.Y.2d 890, 271 N.Y.S.2d 992 (1966). As the court held in the *Schroeter* case, summary judgment is proper "on a claim involving no genuine controversy, notwithstanding the existence of other claims necessitating trial in excess of the amount of the claim for which summary judgment is granted". 49 F.R.D. at 326.

II.

The Court below properly dismissed the counterclaim.

Defendant has asserted an unrelated claim belonging to one of its associated companies, Export, as a setoff against the monies concededly owed to plaintiff by defendant itself. In an analogous case, the English Court of Appeal recently declined to sanction such a scheme. *Pumice Aggregates* v. *Lep Chartering*, [1976] 1 Ll. L. Rep. 529 (C.A. 1975). The same result is warranted here.

Plaintiff originally moved for partial summary judgment, arguing that the court had discretion under F.R.C.P. 54(b) and 62(h) to enter final judgment on the undisputed liquidated wheat claims, despite the presence of the contested unliquidated soybean counterclaim, particularly since defendant's right to assert the counterclaim was at issue and the merits would in any event be resolved by London arbitrators. At the time the moving papers were filed, plaintiff had not seen the purported assignment by Export of the soybean contract. Although plaintiff challenged the alleged assignment, on the ground that it probably had been executed solely for the purposes of this litigation (A48), such a finding was not essential to favorable action on plaintiff's motion. *Cold Metal Process Co.* v. *United*

Eng'r & Foundry Co., 351 U.S. 445 (1956); *Parker* v. *Wellborn*, 261 F.2d 767 (D.C. Cir. 1958).

Defendant did not resist the motion principally on the basis of the assignment. Nor, indeed, was the assignment even produced until defendant found itself in extremis. Instead, defendant opposed the motion by putting forward for the first time bare allegations of a very unusual "running account" between plaintiff and defendant (A55, 57).

It may be noted that the existence of alleged material issues of fact, upon which defendant predicates its appeal, have nothing to do with plaintiff's claims under the wheat contracts, about which there is no dispute. The asserted factual issues exclusively concern the substance of defendant's counterclaim.

In deciding against defendant and dismissing the counterclaim (without prejudice), Judge Ward considered both the terms of the assignment and the following chronology of events:

1976	*Event*
January 15	Defendant acknowledged in writing that it owed plaintiff $223,520 as the balance due on the washout of the first wheat contract (A28).
January 19	Defendant acknowledged in writing that it owed plaintiff $225,866.96 as the balance due on the washout of the second wheat contract (A31).
January 30	Plaintiff took delivery and paid Export for the December and January shipments under the soybean contract (A79).

1976	*Event*
February 18	Plaintiff commenced suit in the Southern District of New York (A3).
March 2	Export purported to assign the soybean claim to defendant (A115-116).
March 17	Export demanded arbitration in London against plaintiff under the soybean contract (A63).
April 22	Export stated its claim against plaintiff under the soybean contract as amounting to $1,490,980 (A62).
August 2	Defendant alleged a "running account" with plaintiff (A55-57).
September 21	Export received a preliminary award from the London arbitrators of $1,493,520, representing the full amount of its claim under the soybean contract (A80).

A. *The Assignment Was Ineffective.*

The assignment was made in the context of litigation which already had commenced. Even if its terms had been unequivocal, the execution of such an assignment by one associated company to another, would alone have rendered it a highly questionable document. *Green & White Const. Co.* v. *Cormat Const. Co.*, 361 F. Supp. 125, 127 (N.D. Ill. 1973).

In truth, the terms of the assignment ultimately conveyed to defendant nothing more than a power of attorney for defendant to act on Export's behalf in accordance with Export's instructions. Thus, the assignment provided that

> "Assignor constitutes Assignee as Assignor's true and lawful attorney, irrevocably, with full power (in the name of Assignor or otherwise); to sue for, ask, require or demand any and all money or claims for money due or to become due arising out of the [soybean] Contract; and to file any claim or to take any action or institute any proceeding including arbitration which Assignor deems necessary in connection with the Contract and the enforcement of rights thereunder" (A115-16).

Events subsequent to the assignment confirm that Export and defendant treated it only as a power of attorney. The demand for arbitration two weeks later in March was made by Export (A63); the claim against plaintiff in April was stated by Export (A61) and the preliminary award rendered by the arbitrators in September was made to Export (A80).

Since the assignment on its face did not divest Export of all interest in the soybean contract, it was ineffective. *Miller* v. *Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 558 (2 Cir. 1976); *Fowler* v. *Coals*, 418 F. Supp. 909 (E.D. Tenn. 1976).

Defendant complains (Br. 29) that the assignment is "ambiguous, and raises a question of fact concerning its meaning" or is a "typographical error." But this is not an ambiguous agreement between plaintiff and defendant, or even between two unrelated persons bargaining at arms-length. It is a wholly self-serving document which passed between a parent and its wholly owned subsidiary. Defendant cites no authority for the proposition that ambiguity in such a document raises a question of fact allowing it

to produce extrinsic evidence. The general rule is that a document, even a contract, is "construed most strongly against the drafter" and a party other than the drafter, who would be prejudiced by the document, is entitled to a "reasonable and practical" construction in its favor. *United States* v. *Seckinger,* 397 U.S. 203, 210-11 (1970); *Instruments For Industry* v. *United States,* 496 F.2d 1157, 1161 (2 Cir. 1974); *Jones* v. *United States,* 304 F. Supp. 94, 101 (S.D.N.Y. 1969), aff'd, 421 F.2d 835 (2 Cir. 1970).

The purported assignment recites on its face that it is a power of attorney and consistently reserves decision-making to Export, the assignor. As this Court has held, the author of a document "has to shoulder the major risk of seeing that within the zone of reasonableness" the words of the document "communicate the proper notions." *Instruments For Industry* v. *United States, supra* at 1161. The Court has also observed that if a drafter "chafes" under this risk, it can obtain relief "by a more meticulous writing" of its documents. *Ibid.* Defendant should not be heard to complain about "lack of clarity" in documents wholly within its control since, as the drafter, it "could have forestalled the controversy." *Ibid.*

It follows that the assignment was ineffective and the court below properly dismissed defendant's counterclaim based on it.

B. ***The Assignment Was Invalid.***

Section 489 of the New York Judiciary Law provides, in pertinent part, that "no corporation * * * directly or indirectly * * * shall * * * take an assignment * * * of a * * * book debt, or any other thing in action, or any claim or demand, with the intent and for the purpose of

bringing an action or proceeding thereon." When such an assignment has been taken, the courts, both state and Federal, have held that the cause of action should be dismissed. *American Optical Co.* v. *Curtiss,* 56 F.R.D. 26 (S.D.N.Y. 1971); *American Restaurant China Mfrs. Ass'n.* v. *Corning Glass Works,* 24 M.2d 634, 198 N.Y.S.2d 366 (Sup. Ct. 1960); N.Y. Gen. Obl. L. §13-101(3). The same rule applies to assignments between associated companies. *Bennett* v. *Supreme Enforcement Corp.,* 275 N.Y. 502 (1937), aff'g 250 A.D. 265, 293 N.Y. Supp. 870 (1st Dep't 1937).

It may be noted that collusive assignments for purposes of litigation are likewise not favored under Federal law. 28 U.S.C. §1359; *Kramer* v. *Caribbean Mills,* 394 U.S. 823 (1969); *Prudential Oil Corp.* v. *Phillips Petroleum Co.,* 546 F.2d 469 (2 Cir. 1976).

The facts concerning the execution of this assignment were totally within the knowledge and control of defendant. In the moving papers plaintiff challenged the assignment as collusive, asserting that it may well have been given solely for purposes of this litigation (A46). Defendant never took up the challenge and responded only by establishing that Export was a separate corporation which defendant had organized for certain tax advantages (A58-60).

In opposing a motion for summary judgment, a defendant is not entitled, even by way of affidavit, merely to allege a material issue of fact. F.R.C.P. 56(e); *Donnelly* v. *Guion,* 467 F.2d 290 (2 Cir. 1972); *Ehrlich* v. *American Moninger Greenhouse Mfg. Corp.,* 26 N.Y.2d 255, 309 N.Y.S.2d 341 (1970). As this Court held in the *Donnelly* case, a party opposing summary judgment must "present

some evidence which supports the bald assertion that there is a dispute" and he is not entitled to "make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial." 467 F.2d at 293.

Plaintiff argued in reply papers to the court below that defendant's failure to offer any proof, to rebut the charge that the assignment was collusive, was evidence in itself that the assignment was invalid and should be disregarded (A105-08). Once again defendant remained silent except for producing the assignment document at the very last minute.[3]

As previously noted, the events after the assignment likewise support the conclusion that the assignment was collusive. Without exception, all of the subsequent activities in furtherance of the soybean claim involved or were undertaken by Export alone—i.e. the demand for arbitration (A63), the statement of claim (A61), and the preliminary arbitration award (A80).

Moreover, although the assignment pertained to a $1,500,000 claim, the sole consideration for it was described as "Ten Dollars ($10.00) and other good and valuable

---

[3] Defendant now protests (Br. 14-15) that plaintiff's reply papers contained "no factual material * * * in support" of the assertions that the assignment was invalid. But all such facts were exclusively within the knowledge and control of defendant who declined to reveal them. Defendant also objects (Br. 4) that plaintiff "did *not* contend in its Rule 9(g) Statement * * * that * * * the assignment was invalid." However, under plaintiff's original theory, the legal insufficiency of the assignment was not essential to entry of final judgment as a matter of discretion under F.R.C.P. 54(b) and 62(h). In addition, defendant's Rule 9(g) counter statement itself did not identify the validity of the assignment as a "controverted and triable issue" (A53). Even if defendant had done so, as this Court has noted, a "Rule 9(g) statement is not a substitute for affidavits alleging facts." *Community of Roquefort* v. *William Faehndrich,* 303 F.2d 494, 498 n.5 (2 Cir. 1962).

consideration" (A115). No business purpose apart from the conduct of litigation is described in the assignment. Defendant argues in this court for the first time that the assignment was given "to minimize a tax obligation" (Br. 25). However the record does not support such a claim. The affidavit of Mr. Bryant, defendant's Assistant Vice President, recites only that to "reduce its tax liability [defendant] conducts all of its export sales through [Export]" (A56). He then goes on to describe the relationship between Export and the defendant, and explains that the assignment was made "[i]n view of this relationship" (A56). Significantly, he did not say that the assignment itself was motivated by tax considerations. Nor does defendant in its appeal papers spell out the tax basis for the assignment. *Ehrlich* v. *American Moninger Greenhouse Mfg. Corp., supra.*[4]

In short, on its face and in the context of the undisputed facts, there can be no doubt that the assignment was invalid.

C. *There Was No Triable Issue Concerning a Running Account.*

In the motion practice below, defendant alleged that there was a "customary running account" between plaintiff and defendant which encompassed the wheat and soybean transactions (A57). In its appeal papers, defendant wisely makes only fleeting reference to the point, without any supporting argument (Br. 10, 12).

---

[4] Such an assignment by Export to defendant is not authorized by the DISC agreement between the two companies, which refers to "net income" of Export and expressly provides for "collections" to be made by Export (A59). Nor is such an assignment sanctioned by the Sections of the Internal Revenue Code governing DISC corporations. Int. Rev. Code of 1954, §§991-97.

To begin with, if the assignment were invalid or ineffective, Export's claim under the soybean contract could not be part of a running account between plaintiff and defendant.

What is more, the particular account conjured up by defendant was most peculiar[5] and was alleged to exist solely on the basis of a custom of the trade.[6]

In simple truth, however, Export's claim under the soybean contract was never treated as part of a running account. In the London arbitration, Export pressed for and received a preliminary award in the full amount of its soybean claim, without giving any credit for the balances concededly due plaintiff under the wheat contracts (A77, 80). Accordingly, defendant has "failed to show * * * that there is any possibility on a trial that he can raise an issue of fact" in regard to a running account. *Community of Roquefort* v. *William Faehndrich,* 303 F.2d 494, 498 (2 Cir. 1962).

---

[5] Running accounts are most often established between suppliers and customers to cover multiple sales of goods and services on credit. *National Shawmut Bank* v. *The Winthrop,* 134 F. Supp. 370, 373-74 (D. Mass. 1955); *Tierney* v. *Dowd,* 238 N.Y. 282, 286, 144 N.E. 583, 584 (1924). The running account alleged here by defendant did not cover sales on credit and applied only to washouts and circle settlements, presumably because both the NAEGA and GAFTA standard forms require payment of cash against shipping documents (A27, 40).

[6] Defendant did not allege that plaintiff had ever agreed to establish such a peculiar account. Nor could defendant infer such acquiescence from prior dealings because the wheat contracts were the first washout and circle settlement between the parties (A77). Defendant's bare allegation that such accounts are "customary" is highly questionable in view of the express provision in the GAFTA form, which applied to the soybean contract (A39), for payment of circle settlements within 30 days (A40).

D. *Defendant Is Not Otherwise Entitled to Set Off Export's Soybean Claim.*

Defendant makes an astonishing new argument in this Court that it is entitled to disregard Export's separate corporate status and to set off Export's soybean claim even apart from the assignment (Br. 34).

In support of this argument defendant improperly goes outside the record to quote excerpts from selected documents mostly pertaining to settlement negotiations (Br. 33). *Schley* v. *Pullman Car Co.*, 120 U.S. 575, 578 (1887); *United States* v. *Anderson*, 481 F.2d 685, 702 n.19 (4 Cir.), aff'd, 417 U.S. 211 (1974); *Bono* v. *United States*, 113 F.2d 724, 725 (2 Cir. 1940). As this Court noted in the *Bono* case, where material facts are asserted in a brief but not shown by the record, it is "the record alone which controls as to the facts." 113 F.2d at 725. The Fourth Circuit went even further in the *Anderson* case, holding that to insert new documents in an appellate brief was "both improper and censurable." 481 F.2d at 702 n.19.

Defendant also distorts the record. Thus, although defendant notes (Br. 35) that the complaint stated a cause of action against it under the corn contract between plaintiff and Deutsche (A7), no mention is made that defendant denied it was a party to the corn contract (A8), the parties stipulated to dismiss the cause of action without prejudice (A124), and the corn contract is now the subject of a pending arbitration in New York between plaintiff and Deutsche.

Similarly, defendant asserts (Br. 35) that the washout of the first wheat contract was accomplished by an agreement (No. 39778/V-91534) between plaintiff and Export (A24-26). Of course, the mechanics of the washout are irrelevant since plaintiff only claims for the balance due under a con-

tract to which defendant was indisputably a party (A22-23). It may be noted that the second wheat contract was washed out in a "circle settlement" with Cook Industries (A31) and plaintiff likewise claims only for the balance due under the contract to which defendant was a party (A29-30).

In any event, defendant is not entitled at this late stage to deny that it was a party to contract No. 39778/V-91534. The DISC agreement between defendant and Export expressly excluded wheat transactions (A58-59). The two other wheat contracts were corrected by pen and ink to substitute defendant for Export as the contracting party (A22, 29). For some reason the copy of contract No. 39778/V-91534 in the record was not so corrected. However, in its acknowledgment of the washout, defendant described contract No. 39778/V-91534 as "our sale to you" (A28). Moreover, in the complaint plaintiff alleged that contract No. 39778/V-91534 reflected a sale "by defendant to plaintiff" (A6), to which allegations defendant made no response (A8) and they are therefore deemed to have been admitted. F.R.C.P. 8(d); *Weitnauer Trad. Co.* v. *Annis,* 516 F.2d 878, 880-81 (2 Cir. 1975).

Apart from the lack of any support in the record, defendant's argument that it may disregard Export's separate corporate status is legally unsound. *United Continental Tuna Corp.* v. *United States,* 550 F.2d 569 (9 Cir. 1977); *Pumice Aggregates* v. *Lep Chartering,* [1976] 1 Ll. L. Rep. 529 (C.A. 1975); cf. *Cannon Mfg. Co.* v. *Cudahy Packing Co.* 267 U.S. 333 (1925); *Cook* v. *Bostitch,* 328 F.2d 1 (2 Cir. 1964); *Compania Mexicana* v. *Compania Metropolitana,* 250 N.Y. 203, 164 N.E. 907 (1928). As the Ninth Circuit recently observed in an analogous case, *United*

Continental Tuna, where a party was not allowed "to pierce its own veil for its own benefit", a company is not entitled to "receive the benefits of the corporate structure when it was to its benefit to claim such an existence" and then "disregard commensurate liabilities when such existence was not favorable". 550 F.2d at 573.

It would be especially unfair to let defendant avoid the consequences of setting up Export as a separate corporation. Not only was this done to secure considerable tax benefits, but in other recent litigation before this very Court defendant and Export have gone so far as to obtain different counsel in order to preserve their individual corporate identities. *Empresa Publica de Commercializacion* v. *S.S. YUKON MART,* 2 Cir., Dkt. No. 76-7505 (argued June 13, 1977).[7]

It follows that defendant is not entitled to set off Export's claim under the soybean contract. The counterclaim was nothing more than an "attempt to escape from an obligation rightly owed" to plaintiff under the wheat contracts, and it was properly disregarded. *Weitnauer Trad. Co.* v. *Annis,* 516 F.2d 878, 881 (2 Cir. 1975); *Pumice Aggregates* v. *Lep Chartering,* supra.

---

[7] Only Export, represented by Messrs. Hill Rivkins Carey Loesberg & O'Brien, remained in the case as an appellee by the time of oral argument. Two months earlier an order had been entered withdrawing the appeal as to defendant, represented by Messrs. Symmers Fish & Warner.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

New York, New York
July 5, 1977

Respectfully submitted,

BURLINGHAM UNDERWOOD & LORD
Attorneys for Plaintiff-Appellee
One Battery Park Plaza
New York, New York 10004
Hanover 2-7585

MICHAEL MARKS COHEN
ROBERT J. ZAPF
Of Counsel

(2) COPY RECEIVED

7- 1977

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By Rosa A Lewis

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775